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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALBERT ANTHONY GARCIA, JR., Defendant and Appellant.	B211465 (Los Angeles County Super. Ct. No. NA074694)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Affirmed with modifications; reversed in part.

Law Offices of Margaret E. Dunk and Margaret E. Dunk, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven E. Mercer and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Albert Anthony Garcia, appeals from his convictions for firearm possession (Pen. Code,[1] § 12021, subd. (a)(1)) and ammunition possession by a felon. (§ 12316, subd. (b)(1).) Defendant admitted that he had been convicted of a prior serious felony and served three prior prison terms. (§§ 667, subds. (b)-(i), 667.5, subd. (b), 1170.12.) Defendant argues the trial court improperly: denied his peace officer records discovery motion; imposed a court security fee as to each count; imposed a specimen and sample fee; and imposed a consecutive term as to count 2. We modify the judgment.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) At approximately 12:19 a.m. on June 10, 2007, Los Angeles Police Officer Fernando Cuevas was directing traffic around an automobile accident at Artesia Boulevard and Atlantic Avenue. Officer Cuevas had parked his police car across the lanes to prevent traffic from proceeding. Defendant, who was driving a truck with four passengers inside, attempted to go around Officer Cuevas's patrol car rather than straight ahead as directed. Officer Cuevas yelled and ordered defendant to stop. Officers Cuevas and Ulises Julio approached defendant's truck. Officer Julio asked for defendant's driver's license. Officer Cuevas learned through the patrol car computer that defendant was on parole for manslaughter. Officer Cuevas returned to defendant's truck to inquire about the parole or probation status of other passengers. Officer Cuevas learned that two other occupants were on parole and one was on probation.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

Officer David Okerman and a partner searched defendant's truck. Officer Okerman found a loaded .45 caliber firearm in the center console of the truck. When Officer Okerman checked the gun, the attached magazine contained seven .45 caliber bullets. There was also one .45 caliber bullet in the chamber of the gun. Officer Okerman told Officers Cuevas and Julio about the gun. Defendant and the other occupants were then handcuffed. Thereafter, defendant and three of the passengers were arrested.

Officers Cuevas and Julio drove defendant to the police station. During the trip, defendant said, "I should have used my gun on you Long Beach pussies." Defendant also identified himself as a local gang member. Defendant also told the officers, "I know people at the DMV that can get me your information." Defendant said: "You know, I can do things. I'll take care of your wife." Once at the booking area of the station, defendant continued to be uncooperative and profanely yelled at the officers. Officer Cuevas was fearful that defendant would follow through on the threats made during the trip to the police station and during the booking process.

III. DISCUSSION

A. The Trial Court's In Camera Review of Police Personnel Records

Defendant argues that the trial court improperly limited the scope of his motion to compel disclosure of the peace officer personnel records. (Evid. Code, § 1045, subd. (b); *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018-1019; *People v. Mooc* (2001) 26 Cal.4th 1216, 1232; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535-540.) Our Supreme Court has explained that the declaration accompanying the motion must set forth a specific factual scenario to support assertions of impropriety: "[Evidence Code] section 1043 . . . , subdivision (a) requires a written motion and notice to the governmental agency which has custody of the records sought, and subdivision (b) provides that such motion shall include, inter alia, '(2) A description of the type of

records or information sought; and [¶] (3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that such governmental agency identified has such records or information from such records.'" (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81-83; see also *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1038; *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 9; *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1148-1149.) In *Warrick*, our Supreme Court further held that the moving party must show a "plausible scenario of officer misconduct" *and* "how the information sought could lead to or be evidence potentially admissible at trial." (*Warrick v. Superior Court*, *supra*, 35 Cal.4th at p. 1026; see *Hurd v. Superior Court* (2006) 144 Cal.App.4th 1100, 1111-1112; *People v. Collins* (2004) 115 Cal.App.4th 137, 151.) An officer's personnel records are not relevant to any issue without such a showing. (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1020; *People v. Collins*, *supra*, 115 Cal.App.4th at p. 151.) We review the trial court's ruling denying a disclosure request for an abuse of discretion. (*Pitchess v. Superior Court*, *supra*, 11 Cal.3d at p. 535; see also *Alford v. Superior Court*, *supra*, 29 Cal.4th at p. 1039; *People v. Memro* (1985) 38 Cal.3d 658, 684, overruled on another point in *People v. Gaines* (2009) 46 Cal.4th 172, 181.)

In this case, defendant filed a motion to compel the pretrial disclosure of the personnel records of Officers Cuevas and Julio. The motion requested materials relating to: "accusations and/or evidence" of misconduct by the two officers. The scope of the written motion was as follows: "For purposes of this motion, the evidence of misconduct sought includes evidence relating to accusations that the above named officers engaged in acts of perjury, fabricating probable cause, fabricating criminal behavior, false statements in police reports, (other writings or oral statements), misleading statements, dishonesty or acts constituting a violation of the statutory or constitutional rights of others. Such material shall include, but not be limited to, material generated during investigations

conducted by the officer's employer, the LBPD (hereinafter 'Investigating Department')."

Defense counsel's declaration in support of the motion included reference to: the "original arrest report (#07-44466)" authored by Officer Cuevas; Officer Cuevas's supplemental report; and Officer Julio's preliminary hearing testimony. Defense counsel's declaration further stated: "The statements made by Officers Cuevas and Julio to the contrary are false, misleading, and lies to make up a legal basis for the stop. Specifically, the statements in the report indicating the making of an unsafe left turn, failure to signal, and a passenger not wearing a seatbelt are not true. Further, the testimony of [Officer] Julio to the same effect while under oath at the preliminary hearing is false. These false statements and testimony were deliberately designed to form a legal basis for the otherwise unlawful traffic stop, (fabrication of probable cause). They are false, misleading, and violate the constitutional rights of Defendant Garcia. [¶] In addition, Defendant Garcia never made any criminal threats against [Officer] Cuevas or his family. These statements too are a complete fabrication of criminal behavior. The officers cannot even [] get it right and produce three (3) different versions of his statements, each becoming more egregious as time goes on. First it is simply 'I know where you stay.' Then in a supplemental report: 'he will come harm my family.' Finally, to make sure he is held to answer on the criminal threat charge, [Officer] Julio testifies the Defendant threatened to 'rape [Officer] Cuevas' wife.' [¶] These statements were never made by the Defendant and are a complete and total invention of the officers. They cannot even get there [sic] story straight and are inconsistent with each other. Such statements are lies made in an effort to manufacture an additional crime to charge the defendant with. [¶] That the requested discovery will show that Officer ULISES JULIO #6273 and FERNANDO CUEVAS #6294 have a pattern of practice of committing acts of misconduct. Specifically, the requested discovery will demonstrate they engage in acts of perjury, fabricating probable cause, fabricating criminal behavior, false statements in police reports, (other writings or oral statements), misleading statements, dishonesty or acts constituting a violation of the statutory or constitutional rights of others."

At the hearing on the motion, the trial court ruled defendant was entitled to compel an in camera disclosure of personnel records of Officers Cuevas and Julio. The trial court stated: "I think you certainly have stated a specific factual scenario. I don't think you needed to cite any case. This is a case where the defendant can only tell what happened, and basically the defendant is saying that they lied regarding the stop and they lied regarding what went on in the patrol car. [¶] I will grant the Pitchess motion regarding these two officers, Officer Julio, 6273, and Cuevas, 6294, regarding falsification and fabrication of probable cause and/or evidence. The trial court then conducted an in-camera review of the police personnel records. Thereafter, the trial court noted: "In this matter I have reviewed the in-camera Pitchess. I have reviewed the information on the two officers. There is no information regarding falsification or fabrication of evidence or probable cause to be turned over, so there are no hits."

Defendant argues: "[T]he trial court erred in limiting the discovery allowed. The trial court limited discovery to only portions of the personnel files of officers Cuevas and Julio. Requested materials related to accusations of dishonesty, perjury or misleading statements, were rejected from the allowed discovery." Preliminarily, following the trial court's statement that it would review the officers' personnel records "regarding falsification and fabrication of probable cause and/or evidence," defendant raised no objection. If, in fact, defendant believed the trial court was about to conduct too narrow of an in camera review of documents, he should have made that clear at the time of its ruling. The trial court then reviewed the records in camera. Thereafter, the trial court specifically found "no information regarding falsification or fabrication of evidence or probable cause" was in the record. Defendant again voiced no objection to the scope of the in camera review. Thus, we agree with the Attorney General the issue raised on appeal has been forfeited. Our Supreme Court has explained, "[A] criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or right to raise the claim on appeal. [Citation.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 880, citing *People v. Simon* (2001) 25 Cal.4th 1082, 1097; see also *United States v. Olano* (1993) 507 U.S. 725, 731.)

In any event, defendant's motion did not meet the *Warrick* standard to establish the necessity for additional information from the personnel files. As our Supreme Court reiterated in *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 71: "We discussed what constitutes a good cause showing of materiality in *Warrick v. Superior Court*[, *supra*,] 35 Cal.4th 1011. The supporting affidavit 'must propose a defense or defenses to the pending charges.' (*Id.* at p. 1024.) To show the requested information is material, a defendant is required to 'establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events.' (*Id.* at p. 1021.) . . . [¶] Counsel's affidavit must also describe a factual scenario that would support a defense claim of officer misconduct. ([*People v.*] *Warrick, supra,* 35 Cal.4th at pp. 1024-1025.) . . . 'In other cases, the trial court hearing a *Pitchess* motion will have before it defense counsel's affidavit, and in addition a police report, witness statements, or other pertinent documents. The court then determines whether defendant's averments, "[v]iewed in conjunction with the police reports" and any other documents, suffice to "establish a plausible factual foundation" for the alleged officer misconduct and to "articulate a valid theory as to how the information sought might be admissible" at trial.' (*Id.* at p. 1025.)" (*Garcia v. Superior Court, supra,* 42 Cal.4th at p. 71.)

Here, defense counsel's declaration, when viewed in conjunction with other documents, did not establish a plausible factual foundation for the type of officer misconduct defendant now vaguely describes; namely, "broader components of character evidence of moral turpitude." The declaration alleges the officers made false statements to fabricate probable cause to stop defendant's truck. The declaration also claims that the officers fabricated the alleged threats made by defendant. Finally, the declaration concludes: "Specifically, the requested discovery will demonstrate they engage in acts of perjury, fabricating probable cause, fabricating criminal behavior, false statements in police reports, (other writings or oral statements), misleading statements, dishonesty or acts constituting a violation of the statutory or constitutional rights of others." These allegations are encompassed by the trial court's scope of review. The trial court did not

abuse its discretion in reviewing the police personnel records for falsification or fabrication of evidence or probable cause.

Moreover, our review of both the in camera proceedings and the personnel records examined by the trial court revealed no justification for additional disclosure. On September 17, 2009, we assigned the trial court to conduct record correction proceedings pursuant to *People v. Mooc, supra*, 26 Cal.4th at page 1231. We directed the trial court to conduct an in camera hearing to identify the peace officer records previously reviewed in camera. On October 20, 2009, the trial court lodged under seal: the transcript of the in camera record correction proceedings conducted on October 15, 2009; the in camera hearing conducted on November 21, 2007; and the peace officer personnel records reviewed in camera. We have reviewed all of these documents and find the trial court did not abuse its discretion in declining to disclose any additional documents. (*People v. Hughes* (2002) 27 Cal.4th 287, 330; *People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

B. Sentencing

1. Consecutive sentence imposed as to count 3

Defendant argues and the Attorney General concedes that pursuant to section 654, subdivision (a)[2] the trial court improperly imposed a consecutive sentence for ammunition possession. Defendant reasons the ammunition was inside the gun at the time it was found in defendant's truck. We agree. We review the trial court's order imposing multiple sentences in the context of a section 654, subdivision (a) question for substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. Downey* (2000) 82 Cal.App.4th 899, 917; *People v. Oseguera* (1993) 20 Cal.App.4th

[2] Section 654, subdivision (a) states in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

290, 294; *People v. Saffle* (1992) 4 Cal.App.4th 434, 438.) The trial court has broad latitude in determining whether section 654, subdivision (a) applies in a given case. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.) Defendant's conduct as a felon in possession of both a firearm and ammunition were part of an indivisible course of conduct. (*People v. Lopez* (2004) 119 Cal.App.4th 132, 138.) As a result, defendant's sentence as to count 3 should have been stayed pursuant to section 654, subdivision (a).

2. Court security fees

Defendant argues that the trial court improperly imposed a section 1465.8, subdivision (a)(1) as to each count. We disagree. (See *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327-1328 [§ 1465.8 fee "is mandated as to 'every conviction,' even if the sentence on a conviction is stayed . . . "]; *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [same]; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866 [§ 1465.8 "unamibiguously requires a fee to be imposed for each of defendant's conviction. Under this statute, a court security fee attaches to "every conviction for a criminal offense""].) The trial court properly imposed two court security fees.

3. Specimen and sample fees

Defendant argues and the Attorney General concedes that the trial court improperly imposed a $20 specimen and sample pursuant to sections 296 and 296.1. We agree. Without further explanation, the trial court ordered defendant to provide specimens and samples pursuant to sections 296 and 296.1 as well as a "$20 specimen and sample" fee. However, there is no provision for such a fee absent the imposition of costs pursuant to sections 1202.1c, 1202.1e, and 1203.1m. (§ 295.1, subd. (j).) No such costs were imposed in this case. The sentence imposing a $20 specimen and sample fee is reversed.

4. Correction of September 24, 2008 minute order

Defendant argues in a footnote the September 24, 2008, minute order should be corrected to more accurately reflect his admissions to prior offense and prison term allegations. Prior to admitting the special allegations, defendant was advised: "It's alleged pursuant to Penal Code sections 1170.12 (a) through (d) and 667 (b) through (i) as to counts 1 and 2,[3] the two counts that you were convicted of, that you suffered the following prior conviction, which is a serous [sic] or violent felony conviction under the law: [¶] That is, case No. TA066431, which is a violation of Penal Code section 192 (a), commonly known as manslaughter, with a conviction date of May 1, 2003 . . . ." Defendant admitted the conviction as advised. Defendant argues that the minute order incorrectly indicates he admitted the prior felony allegation as to count 3 as well. Defendant also argues that he did not admit the prior serious felony pursuant to section 667, subdivision (a)(1) We agree. The section 667, subdivision (a)(1) allegation related only to count 6, the count on which the jury deadlocked. The minute order should be corrected to indicate defendant admitted the prior felony conviction allegation only as to counts 1 and 2 and did not admit the section 667, subdivision (a)(1) felony allegation. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Mesa* (1975) 14 Cal.3d 466, 471.)

In addition, defendant argues that the September 24, 2008 minute order is incorrect because he admitted the section 667.5, subdivision (b) prior prison terms only as to counts 1 and 2. Defendant was advised: "It's further alleged as to those same two counts that you were convicted of, pursuant to Penal Code section 667.5 (b), that you suffered the following prior convictions: [¶] . . . case number NA014416 . . . [¶] . . . case number BA075772 . . . [¶] . . . case number TA066431 . . . ." Defendant

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[3] It is noted that the counts were actually counts 1 and 3, which were renumbered to counts 1 and 2 for purposes of the jury verdicts. Count 6 was referred to as count 3 in the verdict forms.

admitted those prior prison term allegations. Defendant argues that the minute order incorrectly indicates he admitted these allegations as to count 3 as well. We agree that the minute order should be corrected to indicate defendant admitted the prior prison term allegations only as to counts 1 and 2. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070; *People v. Mitchell*, *supra*, 26 Cal.4th at p. 185; *People v. Mesa*, *supra*, 14 Cal.3d at p. 471; see also §§ 1213, 1213.5.) The correction of the September 24, 2008 minute order does not affect defendant's sentence. The trial court is to personally insure the abstract of judgment is corrected to comport with the modifications we have ordered. (*People v. Acosta* (2002) 29 Cal.4th 105, 109, fn. 2; *People v. Chan* (2005) 128 Cal.App.4th 408, 425-426.)

IV. DISPOSITION

The sentence is modified as follows: the sentence as to count 3 is stayed pursuant to Penal Code section 654, subdivision (a); the $20 "specimen and sample fee" is reversed; and the minute order of September 24, 2008 is corrected as discussed in part III (B)(4) of this opinion. The judgment is affirmed in all other respects.

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TURNER, P. J.

We concur:

ARMSTRONG, J. KRIEGLER, J.